No. 87-140 (4)

Supreme Court, U.S.
FILED
OCT 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

BART B. CHAMBERLAIN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, and the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, an individual who personally arranged sales of crude oil at prices exceeding those permitted by the statute may be held jointly and severally liable for restitution along with the corporations that made the illegal sales, on whose behalf he was acting and of which he was the president and principal shareholder.

2. Whether, in a civil action under the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act of 1973, it is appropriate to assess prejudgment interest at the prevailing interest rates used in administrative enforcement actions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Ameejee Valleejee & Sons v. *The M/V Victoria U*, 661 F.2d 310 (4th Cir. 1981) 19
Auditor of Public Accounts v. *Izatt*, 205 F.2d 785 (7th Cir. 1953) 15
Batson v. *Porter*, 154 F.2d 566 (4th Cir. 1946) 15
Bebchick v. *Washington Metropolitan Area Transit Comm'n*, 645 F.2d 1086 (D.C. Cir. 1981) 22
Christmann & Welborn v. *Department of Energy*, 773 F.2d 317 (Temp. Emer. Ct. App. 1985) 19
Connors v. *P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986) 16
Curtis v. *Loether*, 415 U.S. 189 (1974) 12
DeBreceni v. *Graf Brothers Leasing, Inc.*, No. 87-1198 (1st Cir. Sept. 18, 1987) 16
EEOC v. *County of Erie*, 751 F.2d 79 (2d Cir. 1984) 19
EEOC v. *Wooster Brush Co.*, 727 F.2d 566 (6th Cir. 1984) 19
E.I. Du Pont de Nemours & Co. v. *Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir.), cert. denied, 349 U.S. 956 (1955) 23
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 15
Horning v. *District of Columbia*, 254 U.S. 135 (1920) 12
Miller v. *United States*, 474 U.S. 1037 (1985) 13
Mosser v. *Darrow*, 341 U.S. 267 (1951) 18
Mourning v. *Family Publications Services*, 411 U.S. 356 (1973) 22
New York v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). 13

Cases—Continued: Page

Pennzoil Co. v. *Department of Energy*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983) 21
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 15
Sauder v. *Department of Energy*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981) 9, 18
Sheldon v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), aff'd, 309 U.S. 390 (1940) 18
Shell Oil Co. v. *FERC*, 664 F.2d 79 (5th Cir. 1981) 19
Slodov v. *United States*, 436 U.S. 238 (1978) 11
Solomon v. *Klein*, 770 F.2d 352 (3d Cir. 1985) 16
Texas & Pac. Ry. v. *Rigsby*, 241 U.S. 33 (1916) 11
Tillman v. *Wheaton-Haven Recreation Ass'n*:
410 U.S. 431 (1973) 12
517 F.2d 1141 (4th Cir. 1975) 11, 12
United Gas Pipeline Co. v. *FERC*, 657 F.2d 790 (5th Cir. 1981) 19
United States v. *Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), aff'd, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986) 9, 15, 18, 19, 20, 21
United States v. *The M/V Gopher State*, 614 F.2d 1186 (8th Cir. 1980) 19, 23
United States v. *The M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir. 1979) 22
United States v. *Pollution Abatement Services*, 763 F.2d 133 (2d Cir.), cert. denied, 474 U.S. 1037 (1985) 13, 14
United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 17
United States v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976) 13
United States v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, No. 86-382 (Jan. 12, 1987) ... 9

Statutes and regulations:

Economic Stabilization Act of 1970, § 209, 12 U.S.C. (1976 ed.) 1904 note 4, 14, 15, 19
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 2, 19
§ 5(a)(1), 15 U.S.C. 754(a)(1) 4
Employee Retirement Income Security Act of 1974, 29 U.S.C. (& Supp. III) 1001 *et seq.* 16

Regulations—Continued: Page

10 C.F.R. Pt. 205, Subpt. V 9

10 C.F.R. 212.53(a) (1975) 3

15 C.F.R. 377.6(d)(1)(ii) 3

38 Fed. Reg. 21981 (Aug. 15, 1973) (6 C.F.R. 205.9) 3

39 Fed. Reg. (Jan. 15, 1974) (10 C.F.R. 205.9) 3

p. 1924 3

p. 1926 3

Miscellaneous:

H. Coleman, E. Shelton, D. Nichols & C. Thompson, *Analyses of 800 Crude Oils from United States Oilfields* (Tech. Information Ctr., Dep't of Energy 1978) 6

38 Fed. Reg. (1973):

p. 34442 2

p. 34443 2

46 Fed. Reg. 21413 (1981) 19

C. McKinney, E. Ferrero & W. Wenger, *Analyses of Crude Oil from 546 Important Oilfields in the United States* (Bureau of Mines 1966) 6

Restatement of Restitution (1937) 18-19

Restatement (Second) of Torts (1979) 10, 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 826 F.2d 16. The district court's orders of December 30, 1985 (Pet. App. 30a-42a), and February 27, 1986 (Pet. App. 43a-46a), are not officially reported. An earlier opinion of the court of appeals (Pet. App. 47a-68a) is reported at 669 F.2d 717. An earlier opinion of the district court (Pet. App. 69a-102a) is reported at 499 F. Supp. 871.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1987, and a petition for rehearing with suggestion of rehearing en banc was denied on June 23, 1987 (Pet. App. 103a). The petition for a writ of certiorari was filed on July 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note.

STATEMENT

1. Petitioner Chamberlain is the president, a director, and a 90% or 95% shareholder[1] of petitioner Citronelle-Mobile Gathering, Inc. (Pet. App. 3a). He is the president, a director, and an 87½% shareholder of petitioner Citmoco Services, Inc. (*ibid.*).

In December 1973—during the Arab oil embargo and three weeks after Congress had enacted the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*—Chamberlain personally negotiated an agreement resulting in sales in early 1974 by the corporate petitioners of nearly a million barrels of American crude oil to the wholly owned Bahamian refining subsidiary of an American corporation, New England Petroleum Corp. (NEPCO) (Pet. App. 4a, 76a). Because of the embargo and oil shortage, then-new Commerce Department regulations prohibited shipment of crude oil outside the United States unless it could be shown that the "total quantity [and] quality of petroleum available to the United States" would not be diminished. 38 Fed. Reg. 34442, 34443 (Dec. 13, 1973). The companies involved filed affidavits with the Commerce Department assuring that all products refined from the crude oil would be shipped to NEPCO in the United States (Pet. App. 78a-79a; S.R. 497-510). Licenses for the first three shipments were routinely approved by the Commerce Department at the licensing-officer level (Pet. App. 78a; S.R. 347). The license for the fourth and final shipment was, after more substantive discussion, also

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[1] The 90% figure is given in the opinion of the court of appeals (Pet. App. 3a). The original district court opinion stated that Chamberlain owned "approximately 90%" of Citronelle-Mobile Gathering (*id.* at 74a). The counterclaim of the United States alleged, however, and the reply of petitioners admitted, that Chamberlain owned 95% of the stock. Stipulated Record filed in the court of appeals (S.R.) 534, 947.

approved by the Commerce Department since, under the applicable Commerce Department regulations, petitioners were entitled to the licenses to ship the oil to the Bahamas (Pet. App. 78a-80a).[2]

However, the price at which the oil was sold was $14 a barrel ($13 for the last shipment) at a time when, as Chamberlain well knew (S.R. 354), the maximum lawful price for most domestic oil was $5 to $6 a barrel.[3] Despite the round-trip aspect of the transactions that was stressed by petitioners before the Commerce Department, Chamberlain obtained an opinion from his lawyer (Pet. App. 33a) that the transactions were "export sales" exempt from price controls under 10 C.F.R. 212.53(a) (1975). He did not avail himself of the opportunity to seek an opinion on whether price controls applied from the Federal Energy Office, the agency responsible for enforcing such controls.[4] As a result of the transactions the petitioner corporations received at least $6.7 million more than they

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[2] The fourth license application raised a concern among agency officials over the effects of such transactions on American refineries and prompted later amendments to the regulations, 15 C.F.R. 377.6(d)(1)(ii), that precluded granting a fifth license application by petitioners (S.R. 511-520, 1951).

[3] Under Federal Energy Office (FEO) regulations, some oil, such as so-called "new oil," could lawfully be purchased at a higher price, and petitioners paid as much as $11.30 per barrel for the oil that they sold to NEPCO. The government contended that, because petitioners had erroneously advised their suppliers that their purchases were exempt from FEO price controls because destined for export, some of the oil purchased by petitioners was purchased at above the lawful price. However, the district court calculated the overcharges by subtracting from the prices charged to NEPCO petitioners' acquisition costs (whether or not petitioners' acquisitions had been at lawful prices) plus the markup permitted by the regulations (Pet. App. 33a-34a). The government did not challenge these rulings on appeal. It was on this basis that the district court ultimately calculated the amount of the overcharge as $6,769,956.76 (see Pet. App. 33a, 34a).

[4] The availability of such opinions was set out in 39 Fed. Reg. 1924, 1926 (Jan. 15, 1974) (former 10 C.F.R. 205.9) and 38 Fed. Reg. 21981 (Aug. 15, 1973) (former 6 C.F.R. 205.9).

could lawfully have received in transactions subject to price controls (Pet. App. 27a).[5]

2. After petitioners had filed civil actions to enjoin investigations into these transactions (and into other matters not now in issue), the United States counterclaimed for restitution of the overcharges pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1) (S.R. 533-543).[6] The district court (Pittman, C.J.) determined that the transactions were subject to, and hence violated, price-control regulations (Pet. App. 88a-93a); that, because of the difficulties of tracing and calculating the injury to NEPCO's customers, the restitution should be made to the United States (*id.* at 93a-101a); that Chamberlain, because of his own acts as the central figure in arranging the transactions, should be individually liable for restitution to the extent that he received proceeds from the sales (*id.* at 88a); and that petitioners, having received advice of counsel and having made a "good faith

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[5] In addition, Chamberlain himself received $147,828.59 in excess of domestic ceiling prices for sales by him as an individual to the corporate petitioners of crude oil destined for NEPCO (Pet. App. 34a).

[6] Section 209 provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

effort" to comply with the regulations, were not liable for civil penalties (*id.* at 101a-102a).

On interlocutory appeal by petitioners, the court of appeals affirmed the district court's conclusion that the transactions were not exempt from price controls as "export sales" (Pet. App. 49a-53a). The court held that, in distributing the restitutionary fund, the United States had a duty to try to ascertain NEPCO customers who had been injured by petitioners' overcharges (*id.* at 57a-58a), but also held that, in support of an award of restitution, "[n]o proof is required that the plaintiff was damaged, much less the amount of any damage" (*id.* at 57a). This Court denied certiorari. *Citronelle-Mobile Gathering, Inc.* v. *United States,* 459 U.S. 877 (1982).

3. Despite the prior holding of the court of appeals, in determining the amount of overcharges on remand the district court (Alaimo, C.J., S.D. Ga., sitting by designation) conducted a trial on whether the United States had proven damage to NEPCO customers. The evidence confirmed the economic common sense that crude oil prices affect petroleum product prices.

During the Arab embargo period, NEPCO had advised its utility customers that its prices for products refined from crude oils obtained to substitute for embargoed oil would "reflect all increased costs to NEP[CO] or its subsidiaries"[7] of such crude oil (S.R. 1860). Similarly, a NEPCO subsidiary advised customers (the New York City school board and New York City public housing authority) that its prices were being raised "in accordance with our cost" of crude oil (S.R. 1871), and promised that "we will give our customers any advantage of any decreases in cost" (S.R. 1872). NEPCO explained in a filing with the Federal

[7] NEPCO's president confirmed that this reference included NEPCO's wholly owned Bahamian refining subsidiary. S.R. 1732-1733.

Energy Administration (FEA) that in early 1974 it used "a billing formula which increased prices to customers on the basis of NEPCO's [8] costs of crude oil purchases" (S.R. 2030). NEPCO told FEA auditors that a contract with Consolidated Edison Co., the largest customer for NEPCO's fuel oil, was "fairly reflective" of NEPCO's pricing arrangements (S.R. 1857). The contract provided that the prices of refined product delivered to Consolidated Edison would vary in direct proportion to the amount by which "the weighted average cost per barrel of Substitute Crude Oils (as hereinafter defined) delivered to NEP[CO]'s Bahamian subsidiary, PETCO, at the Bahamas Refinery during the month in which such product shall have been delivered to Con Edison" exceeded a base crude oil cost (S.R. 1853).[9]

Despite this evidence the district court decided that there was not "a scintilla of evidence to [show] that the overcharges were indeed passed on to American companies or ultimate consumers" (Pet. App. 35a). The district court

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[8] That filing used "NEPCO" to refer to both NEPCO and its wholly owned Bahamian subsidiary. *E.g.*, S.R. 2013, 2015, 2016, 2024, 2035.

[9] "Substitute Crude Oils" for this particular contract were low-sulphur crude oils, that is, oil having a sulphur content of less than 0.5% (S.R. 1854). Citronelle crude oil is a low-sulphur crude oil. See S.R. 512-513, 1728; C. McKinney, E. Ferrero & W. Wenger, *Analyses of Crude Oil from 546 Important Oilfields in the United States* 32 (Bureau of Mines 1966) (0.38% sulphur); H. Coleman, E. Shelton, D. Nichols & C. Thompson, *Analyses of 800 Crude Oils from United States Oilfields* 43 (Tech. Information Ctr., Dep't of Energy 1978) (0.39% sulphur). (A passing footnote in the first district court opinion (Pet. App. 83a) indicated that Citronelle crude has a sulphur level of 0.75%. The sources cited by the district court (S.R. 620-625, 693), however, instead gave the 0.75% figure as the level of sulphur concentrated into the residual fuel oil that is only one product refined from the crude oil.)

The first three of the four shipments at issue here were made during the period the quoted contract was in effect.

relied on the conclusory assertions of NEPCO's president more than a decade after the fact that his prices were not affected by his crude oil costs, and that NEPCO's prices were tied to the posted prices of competitors (*ibid.*). Both NEPCO's actual prices to its major customers (S.R. 2075-2076, 2110-2118) and the much lower actual posted prices of its competitors during early 1974 (S.R. 2055) were in the record and contradicted the NEPCO officer's recollection, but the district judge did not refer to them.

The government's supposed failure to show that any specific victims were harmed by petitioners' violations was a principal reason cited by the district court in support of its decision to reduce the amount of petitioners' restitutionary obligations by the amount of taxes they had paid, since, in the absence of any nongovernmental claimants for the money, the district court viewed a governmental recovery of pretax profits as a "double" recovery (Pet. App. 38a-39a). The court also cited the fact that mere millions of dollars had been obtained in violation of the law rather than the billions at stake in some other cases, and petitioners' lack of willfulness (*id.* at 37a-39a). With respect to petitioners' lack of willfulness, Judge Alaimo heard no new evidence but relied on the earlier holding made by Judge Pittman in the civil penalty context. The district court also relied on Judge Pittman's earlier holding regarding Chamberlain's individual liability, refusing on law-of-the-case grounds to consider either Chamberlain's arguments to eliminate that liability or the government's arguments to expand its scope in light of intervening decisions of the court of appeals (*id.* at 39a-40a). Finally, the district court also stated without explanation that "in its discretion" it found "that the proper rate to be used in calculating prejudgment interest is the rate set out in Ala. Code § 8-8-8 (1975)," six percent (Pet. App. 44a (amended order clarifying Pet. App. 40a)).

4. On cross-appeals, the court of appeals reaffirmed its earlier holding that the transactions were indeed subject to price controls (Pet. App. 8a-10a). The court specifically reaffirmed its earlier holding that the government need not show damage to NEPCO customers (*id.* at 10a), and accordingly did not reach the government's contention that the district court's finding of no damage was in any event clearly erroneous.

The court of appeals also affirmed the district court's holding that Chamberlain was individually liable because he himself was the central actor in causing the violations. As the court of appeals explained (Pet. App. 15a-16a):

> [P]ersonal responsibility for corporate liability may attach when the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws. But because restitution is an equitable remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case.
>
> Chamberlain played the central role in the Chamberlain Group's breach of public duty as defined by the statute and pricing regulations. Chamberlain authorized and conducted the very negotiations leading to the violations for which the corporations are now liable. Chamberlain knew the agreement was to charge a price almost three times greater than the domestic price ceilings would permit. He knew domestic customers would be the ultimate consumers of the refined oil, but nevertheless used a "loophole" which he believed would excuse him from charging the lawful price. His companies stood to gain some six million dollars in additional revenue. In rejecting the Chamberlain Group's arguments, the district court, Judge Pittman, remarked that "these transactions had precisely the effect which Congress

> sought to avoid in enacting the EPAA * * *." We conclude that Chamberlain's conduct constitutes actual participation in the wrongful acts.

In decisions that it had rendered after Judge Pittman's ruling on personal liability, the court of appeals had held that a central figure personally responsible for causing overcharges is liable for the full amount of the overcharges caused. *Sauder* v. *Department of Energy,* 648 F.2d 1341 (Temp. Emer. Ct. App. 1981); *United States* v. *Sutton,* 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, No. 86-382 (Jan. 12, 1987). Relying on those intervening decisions, as well as similar decisions of other courts of appeals under other statutes, the court held that Chamberlain was liable for the entire amount of the overcharges he caused (Pet. App. 11a-20a).[10]

After explaining why the district court's reduction of the restitution for taxes paid was erroneous (Pet. App.20a-24a), the court of appeals also reversed the district court's unexplained choice of a six-percent interest rate derived from state law, and its unexplained refusal to use the interest rate schedule that the court of appeals had adopted in an earlier, similar case[11] to assure that restitution for overcharges is made at realistic market rates (*id.* at 24a-25a).

Finally, the court of appeals held that the Department of Energy should be able to use its established procedures, 10 C.F.R. Pt. 205, Subpt. V, as a means to distribute the

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[10] Judge Peck, concurring, would not have relied on *Sutton,* because it involved "criminal activity and * * * intentional wrongdoing" whereas Chamberlain had sought advice of counsel (Pet. App. 29a).

[11] *United States* v. *Exxon Corp.,* 561 F. Supp. 816, 857-858 (D.D.C. 1983), aff'd and reasoning on this point expressly adopted, 773 F.2d 1240, 1279 n.40 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).

restitution among injured NEPCO customers, subject to judicial review (Pet. App. 26a-27a).[12]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. a. Corporate officers and shareholders are not insurers of the success of their corporations, and they are not generally responsible for the debts of their corporations. Those who deal with corporations know or should know this, and they can insist on individual guarantees as a condition of lending money or doing business with the corporation. If they do not, then unless there are reasons to "pierce the corporate veil" a corporation's creditors may normally look only to the corporation for repayment.

But it is a commonplace of tort law, and indeed petitioners concede (Pet. 13 (footnote omitted)), that "a corporate officer or employee may be held personally liable for causing or participating in the corporation's commission of a tort." It is also a commonplace of tort law, despite petitioners' contrary argument (Pet. 14-15 & n.8), that conduct can be tortious even though the duty breached by that conduct is one imposed by statute rather than the common law. See generally *Restatement (Second) of Torts* § 874A (1979). Specifically, violation of price-control

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[12] In addition to filing the present petition for a writ of certiorari, Chamberlain, Citmoco, and Citronelle have also filed a new civil action in the district court to vacate the decision entered by Judge Pittman in 1980. They allege that the government obtained an extension of time in 1978 through fraudulent misrepresentation to the district court. On September 18, the government served a motion to dismiss this collateral attack.

statutes is literally a textbook example of tortious conduct (*id.* § 874A comment f, illustration 11). And it is hornbook law that "the power to authorize damages or injunctive relief * * * for the vindication of a federal * * * statutory right * * * exists inherently in the courts" (*id.* § 874A comment g; see *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916) ("[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law")). In short, the theory, whose validity petitioners concede (Pet. 13-15), that a corporate officer may be personally liable for causing a corporation's tort does not become inapplicable just because petitioners engaged in conduct that was declared wrongful by a contemporary Congress rather than a 16th-century judge.[13]

In these situations, the statute declares the conduct to be wrongful, and remedial details are filled in from tort law. Petitioners' attempt to distinguish *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975), as a case "'for the redress of a tort'" (Pet. 14 n.7 (quoting

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[13] In this regard, the present case, which involves breach of a statutory duty not to charge prices in excess of the lawful maximum, is entirely different from *Slodov* v. *United States*, 436 U.S. 238 (1978), on which amici rely (see Chamber of Commerce Br. 12-13). The holding in *Slodov* was that there had been *no* breach of any statutory duty. The government argued in *Slodov* that the acquiror of a corporation that owed certain delinquent taxes had a duty to apply all assets received by the corporaton *after* he acquired it toward payment of those taxes, but this Court held that there was no such duty (436 U.S. at 253-256). The lack of personal liability in *Slodov* was based on the absence of any breach of duty, not on any principle that those who cause corporations to breach statutory duties may escape liability for their wrongful acts.

517 F.2d at 1143)) inadvertently illustrates this point. The "tort" committed by the corporate defendant in *Tillman,* for which the directors were held jointly and severally liable with the corporation in light of their personal participation, was racial discrimination in violation of civil rights statutes. Such discrimination was hardly a "traditional" or "common law" tort of the kind that petitioners would require before personal liability could be imposed (Pet. 14-15 & n.8), but this Court had held that a damages action under a civil rights statute "sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis* v. *Loether,* 415 U.S. 189, 195 (1974), *cited in Tillman,* 517 F.2d at 1143. For that reason, it was appropriate to apply, in the context of a statutory violation, the tort principle allowing personal liability for causing a corporation to commit wrongful acts.[14]

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[14] *Tillman* also illustrates well the invalidity of petitioners' strained suggestion that causing a corporation to engage in conduct in violation of a statute is somehow not tortious—not " 'wrongful' " (Pet. 17)—when it is undertaken on advice of counsel. In *Tillman,* the violators were held personally liable even though they not only got their own attorney's advice that they were not violating the law but also persuaded a federal district court and court of appeals (but not this Court) to agree. See 517 F.2d at 1144, 1146; see also *Tillman* v. *Wheaton-Haven Recreation Ass'n,* 410 U.S. 431 (1973). In the present case, the court of appeals aptly applied Justice Holmes' language to Chamberlain's conduct (*Horning* v. *District of Columbia,* 254 U.S. 135, 137 (1920), *quoted in* Pet. App. 22a-23a):

> It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconstrued the law.

In other words, petitioners' apparent attempt to deduce that Chamberlain's acts in causing his corporations to violate price-control statutes and regulations were not wrongful, just because they were

It is not just in the Temporary Emergency Court of Appeals, and not just in the context of price-control statutes, that corporate officers are held liable for their own acts that violate statutorily imposed duties. As the court held in *United States* v. *Pollution Abatement Services,* 763 F.2d 133 (2d Cir. 1985), cert. denied, 474 U.S. 1037 (1985), there is "no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for *statutorily proscribed* activity" (763 F.2d at 135 (emphasis added)).[15] The court (*id.* at 134-135) correctly distinguished *United States* v. *Sexton Cove Estates, Inc.,* 526 F.2d 1293, 1300-1301 (5th Cir. 1976), on which petitioners rely (Pet. 15), as a case involving an attempt to impose "derivative rather than personal" liability on corporate officers for corporate violations of the Rivers and Harbors Appropriation Act of 1899, which, of course, could not be done in the absence of grounds for piercing the corporate veil.[16]

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held not to be willful, confuses two distinct concepts. Wrongfulness and willfulness are not the same thing.

[15] The *Pollution Abatement* court did not advert directly to the tort-law origins of this holding, but it relied on *New York* v. *Shore Realty Corp.,* 759 F.2d 1032, 1052 (2d Cir. 1985), in which the same court had explicitly held the central figure theory of tort liability to be applicable to a violation of a federal statute.

[16] Despite this distinction, the individual who was held personally liable in *Pollution Abatement* argued that this Court should grant certiorari to resolve a supposed conflict between *Pollution Abatement* and *Sexton Cove.* See also Chamber of Commerce Br. 7-8 n.15 (asserting that these two cases are in conflict with one another). This Court denied certiorari (with one dissent). *Miller* v. *United States,* 474 U.S. 1037 (1985). *Sexton Cove* no more conflicts with the decision in this case than it did with *Pollution Abatement,* and there is no more reason to grant certiorari in this case than in that one. Indeed, because this case involves a different statute than the one at issue in *Sexton Cove* and *Pollution Abatement,* there is much less reason for a grant of certiorari.

The availability of relief against individuals who cause corporate violations of statutes is hardly limited to instances in which it is redundant because the statute expressly provides for individual liability in any event, as petitioners suggest in their attempt (Pet. 14 n.7) to distinguish *Pollution Abatement* as a case where "the governing statute expressly authorized personal liability." To the contrary, the court in *Pollution Abatement* construed a statute that provided only for criminal penalties (see 763 F.2d at 134); *any* civil remedy under that statute was "judicially created" (*id.* at 135) but properly so in light of Congress's desire, manifested in the criminal provisions of the statute, to reach " 'person[s]' " who violated it (*ibid.*). The court of appeals in the present case was on even stronger ground than the *Pollution Abatement* court, because the Economic Stabilization Act already explicitly provides for a civil restitutionary remedy against "any individual or organization" that violates regulations thereunder (§ 209, 12 U.S.C. (1976 ed.) 1904 note).

Moreover, the duty imposed by the statute here, and breached by petitioners, is one that Congress imposed in order to protect persons who (like the typical tort victim who cannot choose his tortfeasor) had no choice as to who might violate their rights several transactions upstream. The overcharges that Chamberlain negotiated, and his corporations carried out, had as their victims NEPCO's customers, and NEPCO's customers' customers—residents trying to cope with utility bills, school boards trying to cope with rising fuel costs, in short, "the American businesses and consumers whom the regulations were meant to protect" (Pet. 3)[17] For just such reasons, the Court has already

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[17] Petitioners deny that Americans were injured by the overcharges (Pet. 3, 11), contending that American oil was consumed by Americans but was paid for by Bahamians, who also threw in their refining services for the privilege of paying Americans to use American oil. But the court of appeals held on petitioners' first appeal

held in construing an earlier price-control statute (which lacked the express statutory restitutionary remedy contained in the Economic Stabilization Act of 1970) that the courts had "inherent equitable jurisdiction * * * to decree restitution of excessive charges in order to give effect to the policy of Congress" (*Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400 (1946)), an authority that "is not to be denied or limited in the absence of a clear and valid legislative command" (*id.* at 398).[18]

(Pet. App. 57a)—in a decision as to which this Court has already denied certiorari (459 U.S. 877)—and it reaffirmed on this appeal (Pet. App. 23a) that, in view of the difficulty of tracing overcharges with precision to particular victims, that task is not part of the government's burden in a price-control case. Accord *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1286 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986); *Batson* v. *Porter*, 154 F.2d 566 (4th Cir. 1946); cf. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In any event, the district court's finding that there was no evidence that specific victims were harmed was clearly erroneous. The evidence unequivocally showed that NEPCO was passing through its crude oil costs (S.R. 1853, 1857, 1860 1867, 1872, 2030), and a comparison of NEPCO's prices (S.R. 2075-2076, 2110-2114) with its competitors' posted prices (S.R. 2055) rebuts any contention that the former were pegged to the latter. Thus, notwithstanding petitioners' contention that the restitution will come to rest in the United States Treasury (Pet. 11 n.6), the United States will use its established regulatory procedures to identify victims of the overcharges (such as Consolidated Edison Company, which will be required to pass through any recovery to its ratepayers) (see Pet. App. 26a-27a).

[18] By a clear and valid legislative command, Congress can, of course, limit the persons against whom restitutionary (or other) remedies may be sought. For example, in *Auditor of Public Accounts* v. *Izatt*, 205 F.2d 785 (7th Cir. 1953), the court construed a price-control statute that Congress had amended to "point[] out that the suit of the overcharged buyer should be brought 'against the seller on account of the overcharge' " (*id.* at 787). The court therefore held that the terms of the statute authorized an action "against the seller alone" and not against its agents and officers (*id.* at 788). Likewise, courts have construed the use of the term "employer" in certain provisions of

Petitioners complain that, "[i]f personal liability can be imposed in this case, it can be imposed in any case" (Pet. 18 (footnote omitted)), for "virtually every corporate violation, no matter how unintentional" (Pet. 16). But the court of appeals said no such thing: it held Chamberlain liable because in this case he himself deliberately caused the transactions that violated the Act, and it carefully noted that, "because restitution is an equitable remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case" (Pet. App. 15a). Petitioners' quarrel is with the conclusion of the court of appeals that on the "particular circumstances and equities" here it was appropriate to hold Chamberlain personally responsible for the violation of law. That conclusion was, however, well founded. Petitioners did not "unintentional[ly]" charge $14 a barrel. As the court of appeals observed (*id.* at 15a-16a):

> Chamberlain authorized and conducted the very negotiations leading to the violations * * *. Chamberlain knew the agreement was to charge a price almost three times greater than the domestic price ceilings would permit. He knew domestic customers would be the ultimate consumers of the refined oil, but nevertheless used a "loophole" which he believed would excuse him from charging the

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the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, to require that certain ERISA actions be brought against a corporate employer alone and not against an individual who directed the corporation's handling of a retirement fund. See *Connors* v. *P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986); *Solomon* v. *Klein*, 770 F.2d 352 (3d Cir. 1985); see also *DeBreceni* v. *Graf Brothers Leasing, Inc.*, No. 87-1198 (1st Cir. Sept. 18, 1987), slip op. 6-7 & n.2. These decisions do not, as petitioners claim (Pet. 15), conflict with the decision below, for they involve construction of particular terms in other statutes to limit the persons against whom actions may be brought.

lawful price. His companies stood to gain some six million dollars in additional revenue.[19]

Petitioners alternatively contend (Pet. 17) that the decision to impose personal liability should be left with the trial judge, and that both trial judges had rejected imposing personal liability. But even if that contention had merit as a general matter, it has no applicability to this case. The second trial judge expressly declined to consider the issue (Pet. App. 39a-40a), and the first ruled that Chamberlain *was* personally liable (*id.* at 88a). The court of appeals reversed the district court as to the *amount* of restitution (*id.* at 18a-20a), not based on any theory that Chamberlain was more "blameworthy" (Pet. 18) than the district court had thought him to be,[20] but based on a correct "reject[ion of] the argument that the common law concept of restitution does not permit a court to order an infringer to refund benefits never received by that individual" (Pet. App. 20a).

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[19] Petitioners' stress (Pet. 5) on the approval of these transactions by the Commerce Department is misplaced. Although Commerce Department approval was required before petitioners could engage in these "export" transactions at any price, it was the role of the FEO, not the Commerce Department, to examine the prices charged. Cf. *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959) (Federal Communications Commission approval of transaction does not immunize it from government attack under antitrust laws). As noted (p. 3, *supra*), petitioners asked their lawyers but not the relevant agency to give an opinion on the legality of the prices charged.

[20] As the court of appeals explained (Pet. App. 14a), the district court's holding regarding Chamberlain's "good faith" was made in the context of deciding whether to impose civil penalties—an issue on which Chamberlain's seeking of legal advice is arguably more relevant—not whether to require restitution, an issue the district court resolved against Chamberlain. In the restitutionary context, Judge Pittman had found that even NEPCO's conduct constituted "unclean hands" (*id.* at 96a), and NEPCO, faced with a shortage of oil to sell its customers in the depths of a northeastern winter, is hardly more culpable than Chamberlain, who profited from the resulting desperation.

b. Chamberlain errs in suggesting (Pet. 18-20) that, in holding him liable for money his corporations received, the court of appeals violated a "universal understanding" (Pet. 19) of restitution that it will never run against someone who did not personally receive the money or goods subject to restitution. This supposed universal understanding is based on unwarranted extrapolation from textbook generalities. A sufficient counterexample is *Mosser* v. *Darrow*, 341 U.S. 267 (1951). In that case, Darrow, a reorganization trustee, was required to make restitution of profits[21] that he allowed others wrongfully to receive, even though the Court noted (341 U.S. at 275) that "there is no hint or proof that he has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make."[22] If anything, Chamberlain stands in a worse position than Darrow: Chamberlain certainly had an interest in his companies' profits, and, on the question of restitution, "it makes no practical difference whether the profit comes to the defendants in the form of a dividend or whether it merely enhances the value of their shares." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, J.), aff'd on other issues, 309 U.S. 390 (1940).[23]

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[21] The trust had incurred no losses (341 U.S. at 272), and hence restitution of profits rather than imposition of damages was the appropriate remedy.

[22] See also *Sauder* v. *Department of Energy*, 648 F.2d 1341, 1348 (Temp. Emer. Ct. App. 1981); *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1272-1273 (Temp. Emer. Ct. App. 1985) (Exxon liable for money received by Texaco), cert. denied, 474 U.S. 1105 (1986).

[23] The *Sheldon* court prefaced this holding by noting that the corporations were not insolvent (106 F.2d at 52). As is evident from Chamberlain's own argument that the corporate veil cannot be pierced, there can likewise be no contention here that Chamberlain's corporations were insolvent at the time of the transactions. Once a restitutionary obligation attaches it is generally not a defense that the wrongdoer had subsequent losses, see *Restatement of Restitution*

2. Both the court of appeals and the agency charged with administering the statute (and before which the majority of enforcement actions proceed) have concluded that the statutory objectives of fully compensating for violations of the price controls and of assuring that violators are not unjustly enriched are in general best served by rates that reflect the full value placed on the use of money by the market. 46 Fed. Reg. 21413 (Apr. 10, 1981); *United States* v. *Exxon Corp.*, 561 F. Supp. 816, 857-858 (D.D.C. 1983), aff'd and reasoning on this issue expressly adopted, 773 F.2d 1240, 1279 n.40 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).[24] There is no indication in either the Economic Stabilization Act or the Emergency Petroleum Allocation Act that Congress intended that oil overcharges would be available to violators as a source of involuntary low-interest loans from consumers.

Of course, the court of appeals has recognized that the district courts retain some discretion in determining interest rates under these statutes. Compare *Exxon*, 773 F.2d at 1279, with *Christmann & Welborn* v. *Department of Energy*, 773 F.2d 317, 321 (Temp. Emer. Ct. App. 1985). But district courts should at least indicate *why* they choose to exercise discretion as they do (see *Ameejee Valleejee & Sons* v. *The M/V Victoria U*, 661 F.2d 310, 314 (4th Cir. 1981)), and, as the court of appeals also recognized (Pet.

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§ 142 comment d (1937), and thus any contention that the value of Chamberlain's shares was subsequently decreased by the corporate petitioners' business losses is no more relevant to Chamberlain's liability than it is to the corporations' own liability.

[24] Such rates are similarly used in natural gas cases. *United Gas Pipeline Co.* v. *FERC*, 657 F.2d 790, 795 (5th Cir. 1981); *Shell Oil Co.* v. *FERC*, 664 F.2d 79, 83 (5th Cir. 1981); see generally *EEOC* v. *County of Erie*, 751 F.2d 79, 82 (2d Cir. 1984); *EEOC* v. *Wooster Brush Co.*, 727 F.2d 566, 579 (6th Cir. 1984); *United States* v. *The M/V Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980).

App. 25a), the district court here failed to offer any such explanation. The district court's unexplained departure from the interest rates adopted in *Exxon* was all the more puzzling because the *Exxon* court, in deciding the appropriate remedy, had explicitly (561 F. Supp. at 858, 859 n.63) cited the first district judge's opinion in this case as involving similar equities.

Petitioners' assertion (Pet. 21) that the district court's decision was "rife with references to equitable considerations" that supported its interest rate determination relies on considerations cited in other aspects of the district court's opinion.[25] If the district court did rely on those considerations in its interest rate determination (without saying so), then it abused its discretion. That the transactions here involved "only" millions of dollars instead of billions as in *Exxon* (Pet. App. 38a) is irrelevant since the restitutionary remedy and any interest thereon are already proportional to the amount of the overcharge. The district court's citation of the four years that elapsed before the suit was brought ignored the fact that the agency was unable to enforce its subpoenas until after petitioners (1) challenged the agency investigation in the District of Co-

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[25] By no means can it be assumed that the district court thought that those considerations, which it discussed primarily in connection with the tax issue, applied also to the interest rate issue. For example, although its opinion is elliptical on this point, the district court seemed to think it relevant to the tax issue to determine whether the United States or private claimants would ultimately receive the amount paid in restitution: the court (ignoring the deductibility from future taxes of a judgment based on pretax profits) thought that recovery by the United States would be in addition to taxes it had already collected, whereas private claimants would be getting an after-tax recovery but would generally have paid for energy costs in pretax dollars, or would have to recognize any recovery as income, or even both (Pet. App. 38a-39a). By contrast, the different tax characteristics of the potential recovery recipients do not have any similar arguable bearing on the interest rate to be charged.

lumbia (S.R. 18), (2) dismissed that suit when the district judge was unreceptive (S.R. 56), (3) filed the present suit three days later (S.R. 2), and (4) forced the agency to trial before it could investigate (S.R. 79-397). As to the government's supposed "fault in permitting the transactions to go forward in the first place" (Pet. 22), the Commerce Department licensed the movement of the oil to the Bahamas because petitioners were entitled to make the shipments. Issuing licenses to which petitioners were entitled was hardly an act for which the Commerce Department can be faulted, and it implied nothing about the separate issue whether the prices charged were lawful under FEO regulations. See note 19, *supra*. Nor does advice of counsel present a consideration that could have justified the district court's departure from *Exxon*, for Exxon was likewise " 'advised by its own counsel in its own interest' " that its transactions were legal (561 F. Supp. at 848 (quoting *Pennzoil Co.* v. *Department of Energy*, 680 F.2d 156, 179 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983))).

Petitioners stress in particular (Pet. 21) the district court's finding that the government had identified no specific victims of the overcharges. This view was totally unfounded. The court of appeals did not even need to reach that issue, however, because the district court's inquiry into whether such a showing was made flatly ignored the prior holding of the court of appeals that the government was not required to present such proof (Pet. App. 57a).

No rule compelled the court of appeals to remand under these circumstances, particularly to a district court that had so misunderstood the prior decision of the court of appeals in this case. The court of appeals had already adopted an appropriate interest rate schedule for use in actions under these statutes in *Exxon*—an interest rate schedule that is already calibrated to market rates and pro-

motes consistency with the use of the same schedules in the vast majority of enforcement actions, which are brought as administrative proceedings. In these circumstances, a remand was unnecessary and would have served no useful purpose.[26] In *Bebchick* v. *Washington Metropolitan Area Transit Comm'n*, 645 F.2d 1086 (D.C. Cir. 1981), another case of protracted litigation involving multiple appeals, the court of appeals chose, "rather than remanding for a further hearing on this problem, the 7.1% figure suggested" by a party (645 F.2d at 1093) because, "[s]o far as we can judge, 7.1% is a fair rate for the period, and not too high" (*id.* at 1094). If anything, the decision here compares favorably to *Bebchick*, since its interest rates are based on actual market rates throughout the relevant period.[27]

United States v. *The M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir. 1979), is not in conflict since the court of appeals in that case concluded that the district court had considered all the equities involved and not abused its discretion in doing so (*id.* at 14), which hardly can be said of the second district court decision here. Moreover, the court in *The M/V Zoe Colocotroni* noted that it had not had the benefit of having been cited any cases in which a district court had been reversed for refusing to award interest above the forum rate, an observation that petitioners elevate into a flat statement that the instant case "appears

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[26] Petitioners' assertion that a remand might serve a useful purpose by allowing the district court to consider the "factual issue of the value of the retained funds to the corporations" (Pet. 22-23 n.14) is mistaken: interest is payable on a debt at a rate set by the market without regard to the borrower's actual return on such borrowed funds.

[27] *Bebchick* involved review of an agency, rather than district court, remedial award, but that is hardly a ground for distinction since courts give an agency's choice of remedy considerable deference (*e.g.*, *Mourning* v. *Family Publications Services*, 411 U.S. 356, 371-372 (1973)).

to represent the very first time a federal appellate court has reversed a district court for using the forum state's rate of prejudgment interest" (Pet. 21). But petitioners need have looked no further than our briefs below for examples of just such cases. See *United States* v. *The M/V Gopher State*, 614 F.2d 1186 (8th Cir. 1980); *E.I. Du Pont de Nemours & Co.* v. *Lyles & Lang Construction Co.*, 219 F.2d 328, 341-343 (4th Cir.), cert. denied, 349 U.S. 956 (1955).

3. Finally, although the exclusive jurisdiction of the court of appeals in cases arising under these statutes prevents a conflict from arising, petitioners suggest a conflict, indeed a conflict in its "most insidious form" (Pet. 24), by urging that the "establishment of specialized courts of appeals carries with it the risk that such courts will develop and apply" rules of law that do not conform to those of the geographic circuits and that "are not sanctioned by usage anywhere else" (*ibid.*). The judges who serve on the Temporary Emergency Court of Appeals, however, also serve—indeed, primarily serve—as district and circuit judges throughout the country. The panel below consisted of a judge from the Sixth Circuit and district judges from Maine and Indiana. It is difficult to credit the assertion that they are so out of touch with the rules of law in the First, Sixth, and Seventh Circuits that they are particularly likely to adopt rules of law "not sanctioned by usage anywhere else." Petitioners' suggestion of rehearing en banc went to judges from within virtually every geographic circuit. If anything, the diverse geographic membership of the court of appeals would tend to guard against, rather than promote, the adoption of parochial views of law in conflict with the jurisprudence of other circuits. Certainly, there was no such conflict here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987--202 037 60065